



March 4, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Written *Ex Parte* Submission in CS Docket No. 98-120

Dear Ms. Dortch:

The Association of Public Television Stations (APTS), the Corporation for Public Broadcasting (CPB) and the Public Broadcasting Service (PBS) (collectively “Public Television”) submit these *ex parte* comments to correct certain errors in a reply paper prepared by Professor Laurence Tribe and submitted on behalf of the National Cable & Telecommunications Association.¹ Public Television responded to an earlier paper by Professor Tribe in August 2002.² Professor Tribe’s most recent paper repeats the factual and legal errors in his earlier document. In this submission, Public Television focuses on a few of the key errors in Tribe’s latest submission.

1. The Tribe Paper Ignores The Facts. Tribe’s paper ignores the factual record developed in this proceeding. Specifically, Tribe incorrectly asserts that “[t]he broadcast organizations offer no proof that multicast programming would actually be produced; that cable

¹ Laurence H. Tribe, *Why the Federal Communications Commission Should Not Adopt a Broad View of the “Primary Video” Carriage Obligation: A Reply to the Broadcast Organizations*, attached to Letter of November 24, 2003 from David L. Brenner, *et al.*, CS Docket 98-120.

² Letter of August 12, 2002, from Jonathan Blake, *et al.* to Marlene H. Dortch, CS Docket No. 98-120.

Ms. Marlene H. Dortch
Secretary
March 4, 2004
Page 2

operators would refuse to carry it; and that as a result television stations would either deteriorate to a substantial degree or fail altogether.” p.16. Each of these assertions is flatly contradicted by the record.

First, there is extensive affidavit and other factual evidence in the record showing that public television stations plan to produce multicast programming, and in many cases already are producing such programming. In their submissions of March 20, 2003³ and September 17, 2003,⁴ Public Television identified numerous examples of multicasting services that public television stations provide or plan to provide. The evidence shows, among other things, that:

- More than 95 percent of all public television stations have committed to broadcast at least one multicast channel dedicated to formal educational programming. PBS YOU (“Your Own University”) is already operating 24 hours a day, 7 days a week, and is licensed to 50 PBS stations.
- 77 percent of public television stations plan to provide a digital multicast channel dedicated solely to children’s programming. PBS KIDS is also operating 24 hours a day, 7 days a week, and is licensed to 55 PBS member licensees.
- Numerous public television stations are developing digital multicast channels dedicated to a variety of innovative programming, including workforce development services, public affairs and local issues, foreign language programming, and the needs of seniors.

Professor Tribe’s assertion that the broadcast organizations have offered no proof that multicasting programming would actually be produced is simply wrong.

³ Ex Parte Comments of Public Television, attached to Letter of March 20, 2003, from Marilyn Mohrman-Gillis to Marlene H. Dortch, CS Docket No. 98-120 (March 20, 2003 Comments). This submission includes multiple affidavits and declarations directed to key factual issues on which Tribe asserts there is no proof in the record.

⁴ Letter of September 17, 2003, from Donna Coleman Gregg, *et al.* to Jane Mago, CS Docket No. 98-120.

Second, there is compelling evidence in the record that public television stations would deteriorate to a substantial degree, and might not survive, if cable operators were to refuse to carry multicast programming. In particular, the factual record developed by Public Television shows that:

- Multicast carriage targeted to smaller and niche audiences is essential to the survival and success of public television in a media environment in which television audiences have become increasingly fragmented and commercial cable and broadcast channels increasingly target specific audiences.
- Public television stations rely heavily on underwriters' contributions to support their programming and operations.
- Underwriters of national television programming often require that the programs they underwrite be available to at least 70 percent of all viewers nationwide.
- Cable operators control access to approximately 70 percent of U.S. television viewers, and therefore denial of multicast carriage by cable operators will preclude public television from obtaining the underwriter contributions and other support necessary to produce the programming.⁵

In short, Professor Tribe's assertion that there is no proof that public television stations will deteriorate to a substantial degree if cable operators refuse to carry their multicast programming is belied by the record.

Third, there is persuasive evidence in the record that cable television operators will not carry multicast programming in the absence of a must carry requirement. Public Television submitted evidence showing that it has engaged in four years of intensive and largely unsuccessful efforts to negotiate for voluntary cable carriage of their stations' HDTV and multicast digital programming:⁶

⁵ March 20, 2003 Comments at 8-12.

⁶ *Id.* at 12.

Ms. Marlene H. Dortch
Secretary
March 4, 2004
Page 4

- Public television's years of intensive efforts to negotiate carriage agreements have resulted in only two national agreements with cable operators, covering only about 20 percent of cable households in the United States.
- Public television stations have been forced into market-by-market negotiations for carriage, and often have fared poorly in those negotiations. Some cable operators have "cherry picked" public television stations, by agreeing to carry only one public television station in a market. Other cable operators have resisted carrying multicast signals and will only carry the station's HDTV programming.

Professor Tribe is simply wrong to assert that there is no proof that cable operators would refuse to carry multicast programming. The record in this proceeding demonstrates that market forces are not sufficient to ensure carriage of public television programming on cable systems.

In short, Professor Tribe's submission is based on fundamental misunderstandings and misstatements about the relevant facts. The actual facts in the record provide strong support for a multicast carriage requirement, and would lead a court to uphold such a requirement under *Turner I* and *Turner II*.⁷

2. The Tribe Paper Is Legally Flawed. Professor Tribe's legal arguments fail because they are based on incorrect assertions about the facts. In addition, Tribe repeats the legal errors in his earlier paper.

a. Professor Tribe appears to concede – as he must – that a multicast carriage requirement would impose no greater burden on cable operators, as a percentage of their total capacity, than the current analog must carry requirement. (As a matter of fact, the burden will be cut in half, because analog carriage requires 6 MHz of cable capacity, while digital carriage requires only 3 MHz of cable capacity.) Tribe continues to insist, however, that the burden on cable operators is "constitutionally irrelevant." pp. 3, 8. Tribe's assertion is contradicted by the

⁷ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*).

Ms. Marlene H. Dortch
Secretary
March 4, 2004
Page 5

Supreme Court's decisions in *Turner*, in which the Court viewed the burden on cable operators as quite relevant to the constitutional issue. *See Turner II*, 520 U.S. at 214 (rejecting cable systems' contention that "the burden of must-carry is great" on the ground that the "actual effects are modest"). The fact that a multicast requirement would not increase, and in fact would substantially reduce, the already "modest" burden on cable systems undercuts Tribe's argument.

b. Tribe continues to mischaracterize the arguments of broadcasters by asserting that broadcasters are claiming a "permanent easement or property right of 6 MHz of space on cable systems" as a result of the *Turner I and II* decisions. p. 8. Public Television has made no such argument. To the contrary, in its prior response to Professor Tribe, Public Television explicitly stated that it was *not* making any such argument. *See* p. 3 ("Public Television has not argued that broadcasters are 'entitled' to 6 MHz on the digital tier as a result of the analog must carry rules.") Instead, its argument is that *Turner I and II* upheld an analog must carry requirement that is no less burdensome than (and, in fact, twice as burdensome as) a digital multicast must carry requirement.

c. Tribe continues to assert that a multicast carriage requirement is not needed to preserve the benefits of free, over-the-air local broadcast television and promote the widespread dissemination of information from a multiplicity of sources. He is wrong on both counts.

On the first point, Tribe simply assumes that carriage of a single programming stream for each broadcaster is sufficient to preserve the benefits of free over-the-air local broadcast television. The record in this proceeding (as summarized above) demonstrates that this is incorrect. If free over-the-air television is limited to a single program stream in the new and increasingly multi-channel environment, its benefits will be greatly diminished and its vitality threatened. Furthermore, it would be illogical to limit the digital must carry requirement to a single standard-definition signal on the ground that this is all that was available in the analog environment. Tribe does not even attempt to argue that digital must carry should exclude HDTV. But multicasting, like HDTV, is a benefit made possible by the transition to digital

television. Depriving viewers of the benefits of multicasting, like depriving them of the benefits of HDTV, would significantly impoverish free over-the-air television.

On the second point, Tribe attempts to deny the obvious by asserting that multicast carriage would not promote widespread dissemination of information from a multiplicity of sources. Multicasting plainly contributes to this goal – indeed, it does so by definition. Tribe speculates that a multicast carriage requirement will “crowd out” cable programming streams that otherwise would be carried by cable systems. There are multiple flaws in this argument. *First*, there is no evidence that a multicast carriage requirement would actually crowd out other programming streams on cable television. In *Turner*, the Court noted that very few cable channels had actually been dropped to comply with must carry requirements. *See Turner II*, 520 U.S. at 214 (94.5 percent of cable systems nationwide did not have to drop any stations in order to fulfill their must carry obligations, and the remaining 5 percent dropped an average of only 1.22 services). There is no dispute that cable system capacity has only increased since *Turner II*, and is likely to increase further. *Second*, if broadcasters cannot provide multicast programming because of a lack of cable carriage, they may well be forced to revert to full-time HDTV broadcasting, which would result in little or no additional capacity for cable programming. *Third*, multicasting will offer additional access and opportunities on commercial and noncommercial stations to programmers who have been foreclosed from direct cable access. *Fourth*, availability on subscription television is not the same thing as availability on free, over-the-air television. A plethora of non-broadcast cable channels is of no benefit to viewers who depend on over-the-air television.

d. Finally, Tribe fails to recognize that limiting the definition of “primary video” to a single programming stream would encourage, and as a result of the financial consequences quite possibly drive, broadcasters to produce a single full-time HDTV programming stream rather than multiple standard-definition programming streams. (Of course, public television stations will broadcast HDTV during prime time and for other programming that would be enhanced by

Ms. Marlene H. Dortch
Secretary
March 4, 2004
Page 7

HDTV.) To the extent government policy alters broadcasters' incentives in this area, it should encourage more, and more diverse, programming. That is especially true because a broadcaster limited to a single programming stream is more likely to direct programming at a general audience, while a broadcaster with multiple programming streams can direct more diverse programming at multiple audiences. A policy that drives broadcasters to a single programming stream will thus affect not only the amount but also the type of programming provided by broadcasters. A government policy that discourages broadcasters from providing additional programming of interest to a wide variety of viewers is antithetical to the First Amendment.⁸

⁸ These examples are intended to identify some of the principal flaws in Professor Tribe's argument. There are other problems as well. For example, as discussed in Public Television's submission of August 12, 2002 (at 14-16), Tribe's argument under the Just Compensation Clause mischaracterizes the Supreme Court's decision in *Turner I* and is inconsistent with other governing precedents. If the Just Compensation argument had merit (which it does not) *any* must carry requirement – including the must carry requirement upheld by the Supreme Court in *Turner* and the single-program digital must carry requirement that Tribe ostensibly urges the Commission to adopt – would be a taking. Thus, the taking argument has no bearing on the choice between a multicast carriage requirement and a single-channel carriage requirement.

Ms. Marlene H. Dortch
Secretary
March 4, 2004
Page 8

Respectfully submitted,

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